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SUMMARY RECORD OF THE 587th MEETING

Held at Headquarters, New York,
on Thursday, 30 May 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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The meeting was called to order at 10.10 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17, A/CN.9/426)

Article 12 (continued)

1. Mr. SANDOVAL LÓPEZ (Chile) proposed some drafting changes in article 12 which he believed would solve the problems referred to by the German representative at the previous meeting. Paragraph 2 of the article should read: "Where the originator has not requested that the acknowledgement be in a particular form, it shall be understood that any communication from the addressee, including in electronic form, should be sufficient to indicate to the originator that the data message has been received ...." Paragraph 5 could begin: "Where the originator receives an acknowledgement of receipt of a data message, whether by communication or conduct of the addressee, including in electronic form, it is presumed that the addressee has received that message ...."

2. Mr. SORIEUL (International Trade Law Branch) replied to a number of questions raised at the previous meeting. Concerning a situation where a message was acknowledged but had not been received, he drew the Commission's attention to article 12, paragraph 5, and to the Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426). In fact, there was a clear analogy with the regular mail where a letter was sent by "return receipt requested" and was acknowledged, but not received by the addressee.

3. The specific form of an acknowledgement of receipt, dealt with in paragraph 2, was also a matter of interpreting legal norms by analogy with the regular mail. If the acknowledgement was not in the particular form specified by the originator, it would be considered not to have been received and the procedure laid down in article 12, paragraph 4, would apply. Paragraph 2 could also be expanded to cover cases in which the originator requested a particular form of acknowledgement. Neither of those questions was directly related to that of acknowledgements in electronic form; from the outset, the Commission had understood that the form of an acknowledgement was left to the originator's discretion. That was clearly explained in the Guide to Enactment of the UNCITRAL Model Law.

4. The representative of Singapore had asked about distinguishing between an acknowledgement of receipt in electronic form, which might be automatically generated by the addressee's equipment, and other forms which would require the addressee to take action. In fact, the Working Group had not misunderstood the differences between the various categories of electronic acknowledgements, ranging from devices which responded automatically to those which required human intervention. In order to avoid complications, article 12 deliberately did not go into detail but rather focused on the function of an acknowledgement, while providing some general principles. Before taking action, the Commission should seriously weigh the benefits of breaking up article 12 into a number of more specific provisions.

5. Mr. CHANDLER (United States of America) said article 12 did not have to contain details on various forms of acknowledgement because the parties would of necessity have reached a prior understanding if they used sophisticated acknowledgements such as retransmitting the message back to the originator for verification. If such an understanding existed between the parties, there was no need for intervention.

6. The word "form" was potentially misleading because it had several uses. It could be understood to mean a bureaucratic form or a generalized form in structured electronic data interchange. It would be regrettable if the use of the term resulted in the rejection of an acknowledgement. Perhaps another term, such as "kind" or "method", should be used.

7. Mr. ALLEN (United Kingdom) said the beginning of article 12, paragraph 2, should read: "Where the originator has not requested that the acknowledgement be given by a particular method ...".

8. Mr. BISCHOFF (Observer for Switzerland) said he would prefer to retain the word "form" and add "method" and/or "particular type". He proposed inserting the words "be of a particular type or" before "be in a particular form".

9. Mr. ABASCAL (Mexico) noted that the word "form" appeared in many articles of the Model Law. If it were deleted in one place, the Working Group would be forced to review its use in other articles for the sake of consistency.

10. Mr. ALLEN (United Kingdom) agreed with the observer for Switzerland that "form" should be retained. The English version would then read: "Where the originator has not requested that the acknowledgement be in a particular form or be given by a particular method ...".

11. Mr. MADRID (Spain) agreed with the Mexican representative that "form" should not be deleted. Unless delegations felt strongly that the specific forms of acknowledgement should be differentiated, it would be preferable not to engage in an exercise that involved reviewing the language of all the articles.

12. Mr. SCHNEIDER (Germany) supported the remarks made by the Observer for Switzerland and the representative of Spain. The term "form" should be retained, although he was not averse to adding "procedure" or "method".

13. Mr. CHOUKRI (Observer for Morocco), citing various articles of the Model Law, stressed that the term "form" was the most suitable.

14. Mr. ABASCAL (Mexico) said that the problem stemmed from the fact that the concept of "acknowledgement of receipt" was not defined. "Acknowledgement of receipt" should mean that the message was received and nothing more. The lacuna in article 12 could be rectified by adding a paragraph indicating that an acknowledgement of receipt in electronic form fulfilled all the requirements of paragraphs 2, 3 and 4.

15. Mr. SANDOVAL LÓPEZ (Chile) agreed with the Mexican representative that there was a lacuna in article 12, paragraph 2, because an acknowledgement in electronic form was not specifically mentioned.

16. Mr. SORIEUL (International Trade Law Branch) stressed that "acknowledgement" simply meant that the message had been received. As specified in the Guide to Enactment of the Model Law, it gave no indication of the addressee's position on the content of the message. He failed to see how article 12, paragraph 2, was insufficient or in any way opposed to an acknowledgement in electronic form. The paragraph was intended to describe the function, not limit the form, of an acknowledgement; it even recognized the addressee's conduct as a tacit form of acknowledgement (the classic example being when an originator placed an order for goods and the addressee shipped the goods without acknowledging receipt of the order). If the Commission wished, it might specify in the Guide that acknowledgement could be manual or electronic; however, even that seemed redundant.

17. Ms. BOSS (United States of America) said that the original intent of article 12 was to validate acknowledgements of receipt generated by computers. While her delegation would prefer to retain article 12 as it stood, the fact that some delegations had raised questions about the interpretation of the article indicated that the intent of the article had not been expressed clearly. The amendment suggested by the representative of Mexico might help to clarify that functional acknowledgements could be issued spontaneously by computers and still satisfy the requirements of article 12. Unfortunately, that proposal might exclude other types of acknowledgement, such as instances where an acknowledgement of receipt was issued on behalf of an addressee by its third-party provider or by an intermediary.

18. Mr. ZHANG Yuqing (China) said that his delegation supported the Mexican proposal. According to article 12, paragraph 2, if the originator requested that the addressee should use a particular form of acknowledgement, only that form could be regarded as the acknowledgement of receipt. In cases where there was no particular request, any communication or conduct could constitute acknowledgement of receipt. The particular form requested by the originator should be taken as the standard; otherwise, any kind of communication or conduct could be regarded as acknowledgement of receipt. Perhaps a few more sentences could be added to paragraph 2 in order to clarify the concept of "particular form".

19. Mr. ABASCAL (Mexico) said that the secretariat's suggestion that the problem of defining "acknowledgement of receipt" could be solved by referring to another document was not appropriate. The definition must be provided in the Model Law itself.

20. The problem in article 12, paragraph 2, was that, if the originator sent a message requesting a particular form of acknowledgement, and the addressee had a system that issued acknowledgements of receipt automatically, it was quite probable that the addressee would assume that there had been automatic acknowledgement of receipt and would not pay any attention to the written message. That might lead to a situation in which it would be deemed that there had been inappropriate conduct on the part of the addressee because he did not comply with the originator's request.

21. The United States representative had made the point that, if the Commission dealt with automatic acknowledgements of receipt, it might be excluding other

types of acknowledgement. Perhaps the Commission could come up with much more general wording that would cover the overall situation. In order to avoid referring to automatic acknowledgement of receipt in a given system, the Commission might consider such wording as "the addressee uses a method for acknowledgement of receipt in which he can place reasonable trust without observing any particular conduct". That would provide security for all parties in the transaction and would promote the use of electronic data interchange.

22. Mr. ALLEN (United Kingdom) said that, in order for the presumption contained in article 12, paragraph 5, to apply, it should be sufficient if the acknowledgement of receipt was an acknowledgement of the addressee, whether such acknowledgement was generated automatically or generated by the addressee personally or by a person acting on the addressee's behalf. The acknowledgement would not be sufficient if it was generated by a third person who was not acting on behalf of the addressee. The beginning of the first sentence of article 12, paragraph 5, should be amended to read "Where the originator receives an acknowledgement of receipt of the addressee,".

23. Article 11, paragraph 2, did not contemplate the possibility of an automatic message, and he suggested that the following words should be added to the end of that paragraph: "or by a system operated by or on behalf of the originator". That would make it clear that any automatically triggered message that was communicated by a system by or on behalf of the originator would be attributed to that originator. In article 12, paragraph 5, an automatically triggered acknowledgement of receipt would then fall within that wording because paragraph 5 would have been amended to make it clear that it only concerned an acknowledgement of receipt of the addressee.

24. Mr. SORIEUL (International Trade Law Branch) said that, while the United Kingdom proposal might improve the text of article 12, it would not solve the problem under consideration. In its current form, article 12, paragraph 2, must be interpreted a contrario; in other words, if the originator of the message requested that acknowledgement of receipt should be provided in a particular form and that form was not respected, it would follow that the conditions required in article 12, paragraph 4, had not been fulfilled and acknowledgement of receipt had not been received. The Commission was now being told that, if the addressee had a system that issued acknowledgements of receipt automatically, the automatic acknowledgement of receipt must be accepted as valid in the Model Law even if the form of the acknowledgement of receipt was not the one requested by the originator. Perhaps article 12, paragraph 2, could be amended to indicate that any automatically issued acknowledgement of receipt was automatically valid even if the originator had not requested that particular form of acknowledgement.

25. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that it was his understanding that article 12, paragraph 2, did not deal with any questions that were unrelated to the originator's request. His delegation was satisfied with the text as it stood. Perhaps additional paragraphs could be added to article 12 in order to deal with the questions raised by a number of delegations.

26. Mr. ABASCAL (Mexico) said that the explanations and suggestions by the secretariat were very reasonable. According to the current drafting of article 12, paragraph 2, the originator determined the procedure for acknowledgement of receipt. His delegation was proposing that the originator should not determine the form or method for acknowledgement of receipt. Rather than referring to automatic acknowledgement of receipt, the Commission should use language that made it clear that the addressee should be able to use a reasonably trustworthy method of acknowledgement of receipt. That would protect the use of electronic data interchange systems.

27. While the United Kingdom proposal contained some useful elements, article 11, paragraph 2, was not applicable to the question under discussion.

28. Mr. CHOUKRI (Observer for Morocco) said that his delegation preferred to retain the text of article 12, paragraph 2, as it stood.

The meeting was suspended at 11.25 a.m. and resumed at 12.05 p.m.

29. Mr. SORIEUL (International Trade Law Branch) said the Commission needed to decide how it wished to deal with acknowledgements of receipt that were automatically generated. On the one hand, allowing the originator to determine the form of acknowledgements of receipt was not desirable, but on the other, the possibility that the originator would need to receive acknowledgement in a particular form could not be ignored either. As currently provided for under article 12, control of the procedure for acknowledgement of receipt lay largely with the originator.

30. Mr. MADRID (Spain), supported by Mr. SANDOVAL LÓPEZ (Chile), raised the possibility of a more balanced solution that would not give the determining power to either the originator or the addressee. Article 12, paragraph 2, could be amended to read "Where the originator has requested that the acknowledgement be in a particular form, the request for an acknowledgement shall be deemed satisfied if the requirements established by the originator have been met. However, if the addressee has an automatic system for acknowledgement of receipt, the request for an acknowledgement may be deemed satisfied when the acknowledgement is sent to the originator."

31. Mr. ALLEN (United Kingdom) agreed with the Spanish representative that a more balanced approach was needed, and proposed that the following sentence should be added to the beginning of paragraph 2: "Where the originator has requested that acknowledgement be given in a particular form, or by a particular method, an acknowledgement is only sufficient for the purposes of paragraphs 3 and 4 if given in that form or by that method, provided that the form or method requested is not unreasonable in the circumstances."

32. Mr. CHANDLER (United States of America) said that while article 12 had originally been intended as a default rule, its current formulation left to the originator the exclusive ability to determine the particular form to be taken by the acknowledgement of a message; perhaps the addition of a formulation such as "When the parties have not otherwise agreed on a particular form" would be more useful. The phrasing suggested by the United Kingdom still appeared to leave undue control in the hands of the originator.

33. Mr. FERRARI (Italy) agreed with the United States representative in calling for a reference to whatever agreement existed between originator and addressee regarding the form or manner of acknowledgement, rather than allowing the originator exclusively to determine the form of that acknowledgement. He also requested the deletion from the United Kingdom proposal of the wording concerning unreasonable requests.

34. Mr. ABASCAL (Mexico) said that the United Kingdom proposal was reasonable; he also supported the United States proposal to make explicit the fact that article 12 was a default rule. The two proposals could be combined by stating clearly that when the parties had not agreed on a method for acknowledging receipt, and when the originator had requested a particular method, then the request for acknowledgement should be satisfied in accordance with the originator's request if that request were reasonable under the circumstances.

35. Mr. SCHNEIDER (Germany) said that the meaning of the new text as proposed by the United Kingdom was very different from that of the old text. While it was necessary to fulfil an explicit request by the originator for acknowledgement in a particular form, a separate and distinct question arose as to the feasibility of making an acknowledgement in the form of a data message when no particular form had been requested.

36. A question also arose as to the nature of the presumption in article 12, paragraph 5: i.e., whether an acknowledged message had simply been received, or if it had been received exactly as sent. He therefore proposed that some form of wording such as "Presumption does not extend to the content of the message" should be added at the end of the paragraph.

37. Mr. PHUA (Singapore) said he supported the United Kingdom proposal and agreed with the German delegation that the presumption established in paragraph 5 was unclear. To solve that problem, he proposed that paragraph 5 should contain a statement similar to the eighth sentence of paragraph 98 of the Guide, to the effect that article 12 was not intended to deal with the legal consequences that might flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message.

38. Mr. GRIFFITH (Australia) said that the United Kingdom proposal would substantially alter paragraph 2 so that it no longer dealt with cases where the originator of a data message did not request a particular form of acknowledgement, but with the opposite situation. It would also create uncertainty for the addressee, who would have to determine what was or was not "unreasonable in the circumstances"; under paragraphs 3 and 4, any errors in that regard would nullify the legal effect of the acknowledgement. The Commission should not make such substantial changes to the text, since they only introduced new uncertainties.

39. Mr. SORIEUL (International Trade Law Branch) said that it was his understanding that the United Kingdom proposal was intended only as an addition to the current text, not as a replacement.

40. Mr. GRIFFITH (Australia) said he agreed with the representative of Germany that the Commission should assume that the current text was being retained unless delegations expressed clear and unanimous views to the contrary.

41. Mr. BURMAN (United States of America) said he shared the view expressed by the representative of Australia. He would prefer to retain the current text of paragraph 2, but with the wording proposed by his delegation. If delegations wished to consider additional provisions, such as the addition proposed by the United Kingdom, it could establish a small working group to study them and report back to the Commission; he suggested that the delegation of Singapore should organize that group.

42. Mr. ANDERSEN (Observer for Denmark) said he agreed with the United States delegation that a drafting group should be set up.

43. Mr. PHUA (Singapore) said his delegation accepted the United States proposal that it should head the working group.

44. Mr. ABASCAL (Mexico) said he wished to clarify that the proposal concerned a working group and not a drafting group, and that its role would be to find a compromise solution to the issues raised.

45. Mr. SORIEUL (International Trade Law Branch) said the working group would require a precise and narrowly defined mandate. He wondered whether that mandate would include the consideration of the United Kingdom proposal, the issue of automatic acknowledgements and the United States proposal to delete the references in paragraph 2 to the originator of a data message as the party that determined the form of the acknowledgement of receipt. That last proposal would affect the whole of article 12, which concerned situations where the originator took the initiative in that regard. The working group could also consider the presumption established in paragraph 5; in that connection, he agreed with the representative of Singapore that the sentence from paragraph 98 of the Guide would provide a useful clarification.

46. Mr. ABASCAL (Mexico) said a working group could be useful for expediting the Commission's work and for finding compromise solutions that would enable the Commission to take a better-informed decision. The working group should take into account the points raised by the representatives of Spain and the United Kingdom, to the effect that neither the originator nor the addressee should be given all the power to determine the form of an acknowledgement, and should draft the resulting provision in positive terms, in contrast to the current text of paragraph 2, which was easily misinterpreted. The Commission should identify other problems with article 12 for submission to the working group.

47. Mr. LEBEDEV (Russian Federation) said he agreed that the current text of article 12 should be considered a "default" text that should be retained to the extent possible. The working group should prepare a written text comprising proposed alternatives to the current text; it should not simply present its conclusions orally. To save time, the text could be circulated in only one language.

The meeting rose at 1 p.m.